BRIEF.

I.

The Circuit Court of Appeals Has Decided Genuine Issues of Material Fact in a Summary Judgment Proceeding Thereby Depriving Petitioner of a Jury Trial in Violation of Rule 56 of the Federal Rules of Civil Procedure and Its Determination of Its Power Under Said Rule Conflicts With All the Decisions of Other Circuit Courts of Appeal and Constitutes Such a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision.

In the case at bar there has never been a trial. Both parties filed motions for summary judgment in the trial court (R. 10, 19). That court allowed the motion of the surety and denied that of Pinkerton (R. 65). The appeal was from the summary judgment entered by the trial court in favor of the surety and from the denial of Pinkerton's motion for summary judgment (R. 66). All proceedings have been by way of summary judgment or upon appeal from the judgment entered therein.

Suit is upon the bond of Lawrence J. O'Connell, Chief Security Examiner of the Industrial Commission of Illinois. The bond is conditioned that O'Connell will

> "* * * faithfully perform all the duties pertaining to the office or employment of such Security Examiner * * * and shall faithfully account for and pay over to the parties entitled thereto all monies that shall come into his hands *by virtue of said office or employment.* * * *" (Italics ours.) (R. 5.)

The breach alleged is that, during 1936, "* * * O'Connell, while acting as Chief Security Examiner of the Industrial

Commission of Illinois, * * *," converted plaintiff's treasury bond to his own use (R. 4).

One of the defenses interposed by the surety's answer is that, if O'Connell received and converted the treasury bond, he did not do so by virtue of his office or employment as Chief Security Examiner (R. 8). This defense is predicated upon two independent premises, the determination of either of which in favor of the surety would entitle it to judgment: (1) that the industrial commission is not vested with legal authority to receive deposits of collateral from self-insurers; hence, O'Connell, as its employee, had no such authority; and (2) even if the commission had such authority, it was not a part of O'Connell's duties to receive collateral deposited by Pinkerton or other employers seeking to become self-insurers under the Illinois Workmen's Compensation Act.

Since the industrial commission is created and its duties are prescribed by statute, that portion of the defense based on lack of authority of the industrial commission itself involves a question of law, and, we concede, the Circuit Court of Appeals acted within its power in considering and deciding such legal question.

Even if the industrial commission did have authority to accept and hold collateral deposited by self-insurers, it does not follow that O'Connell had such power or that accepting or holding such collateral was a part of the duties of his office or employment. The office of Chief Security Examiner is not created by statute and the duties of the incumbent are not prescribed by statute but are prescribed by the Illinois Industrial Commission. The duties of O'Connell are to be determined solely from facts, namely, delegations of power to him by the industrial commission and possibly acts of holding out by the industrial commission. This involves wholly a question of fact.

Thus, although the defense asserted could have been determined in favor of the surety upon a pure question of law, it could be determined adversely to the surety only by determining the specific question of fact as to what authority was delegated to O'Connell by the industrial commission, either specifically or by way of holding out.

The Circuit Court of Appeals does not take issue with the surety's contention that it is not liable under its bond for acts of O'Connell which were not done by virtue of his office.[1] That court arrived at its conclusion by determining, as a matter of law, that the commission had authority, and as a matter of fact, that it was within the scope of O'Connell's duties to receive Pinkerton's treasury bond. Thus, the Circuit Court of Appeals has decided the issue of fact as to O'Connell's duties contrary to the decision of the trial court. It did so by weighing inferences, which it drew from circumstances, against the positive direct statement of O'Connell's duties and of his lack of authority contained in the affidavit of the Chairman of the Industrial Commission.

The surety, feeling that there was no possibility of a contention by Pinkerton that the duty of receiving deposits of collateral had been imposed upon O'Connell and that Pinkerton's complaint showed its action was barred by the Illinois five-year statute of limitations, made its motion for summary judgment. Following receipt of notice of the surety's motion, Pinkerton served notice of a similar motion and both motions were filed in court the same day (R. 10, 19). In support of its motion the surety filed the affidavit of Peter J. Angsten, Chairman of the Illinois Industrial Commission during the time involved in this case,

1. The following cases decided by the Supreme Court of Illinois firmly establish such to be the rule:
Orton v. *City of Lincoln*, 156 Ill. 499, 502.
People v. *Tompkins, et al.*, 74 Ill. 482.

wherein Angsten specifically stated that O'Connell's duties were limited to examining financial statements of employers who applied for self-insurance, and if such statements were not satisfactory, to informing such employers of the amount of securities they should deposit with a qualified bank or trust company. Angsten further stated that neither he nor any other member of the commission, to his knowledge, knew of the agreement signed by Pinkerton and O'Connell dated August 9, 1935, or of the deposit of Pinkerton's treasury bond, and that if the agreement was executed by O'Connell, he did so without the authority, approval, direction or knowledge of the commission and outside the duties of his employment (R. 43).

The affidavit is affirmative proof of O'Connell's lack of authority, but it is not all of the evidence that could or would be produced as to such lack of authority upon a trial. Each of the other four members of the industrial commission could likewise testify as to O'Connell's lack of authority and circumstantial evidence could also be produced. The surety did not attempt or purport to produce all of the evidence because under Rule 56 it is necessary to produce only enough legally competent evidence to prove the fact upon which it is contended there is no genuine material issue. If the evidence so produced proves the fact and there is no controverting evidence, the moving party is entitled to summary judgment, if, as a matter of law, such fact has the legal effect contended. If, however, opposing evidence is produced summary judgment proceedings are not applicable regardless of how greatly the evidence in favor of the fact preponderates over the opposing evidence. Hence, it is without purpose to produce more than the quantum of evidence necessary to legally prove the contended fact.

Pinkerton filed the affidavit of J. O. Camden, the scope of which is that the treasury bond was actually deposited

with O'Connell on August 9, 1935, at which time an escrow agreement was signed by Robert A. Pinkerton in the name of Pinkerton and by O'Connell as Chief Security Examiner in the name of the industrial commission. The affidavit further states the treasury bond has not been returned and sets up several demands made by Pinkerton for interest coupons and the return of the treasury bond. The affidavit does not purport to contain any specific statement as to delegations of authority by the industrial commission to O'Connell. At most, it contains statements of acts by O'Connell (R. 11). In addition to the affidavit, Pinkerton submitted various letters (R. 27-40). None of the letters purports to pertain to delegations of authority to O'Connell and the entire scope of the letters is a showing of acts by O'Connell.

Believing that it was immaterial whether O'Connell converted Pinkerton's treasury bond, if he did not do so by virtue of his office, and that Pinkerton had not offered any evidence that actually does or even purports to contradict Angsten's affidavit, the surety proceeded under the theory and the trial court found that there was no issue on the surety's contention of fact that O'Connell did not act by virtue of his office.

If the surety and the trial court are wrong in their position that the affidavit of Angsten is not offset by any evidence and that said affidavit does establish the fact that O'Connell's acts were not by virtue of his employment, the result is merely that the surety was not entitled to a summary judgment. The failure of the surety to establish this fact by the one affidavit, so that there is no genuine issue thereon, does not establish the converse that O'Connell did receive and convert Pinkerton's treasury bond by virtue of his office, so that there is no genuine issue as to that material fact. The most that can be said is that the evidence conflicts as to whether it was a part

of O'Connell's duties to receive Pinkerton's treasury bond.

The Circuit Court of Appeals does not take the position that Pinkerton has proved, without opposing proof, that O'Connell was acting by virtue of his office, or that the affidavit of Angsten was not some legal evidence that he was not so acting. What the Circuit Court of Appeals did was to draw inferences from circumstances; some in the record and some outside of the record,[1] weigh those inferences against the direct affidavit of Angsten, and, from such weighing of conflicting evidence and circumstances, determine as a matter of fact that it was a part of O'Connell's official duties to receive deposits from self-insurers.

This is evident from an examination of the 11th, 12th and 13th paragraphs of the decision of the Circuit Court of Appeals (Appendix pp. 35-37). In Paragraph 11 the court discusses various instances of alleged holding out;[2] in Paragraph 12 it discusses constructive knowledge on the part of the commission that O'Connell was receiving deposits of collateral and the implication of negligence on the part of the commission which would result if Angsten's affidavit were believed (it is novel that a witness' testimony is to be rejected because it convicts him of negligence or even wrongdoing); in Paragraph 13 it considers a letter of July 22, 1941 from a subsequent chairman of the commission as impeaching Angsten's affidavit, because, the Circuit Court of Appeals felt, the letter showed that, at

1. There is no evidence that O'Connell, during his employment, made no effort to conceal the file containing the matter applicable to Pinkerton's deposit, or that said files were properly indexed.

2. It is not logical to conclude that O'Connell was held out as being authorized to receive deposits from the fact that letterheads named him as "Chief Security Examiner". The word "Examiner" contains no implication of the word "depositary".

that time, there was no thought in the mind of the commission that O'Connell had authority to accept the deposit of Pinkerton's collateral. (It is also novel to reject the positive testimony of Angsten because a subsequent chairman had an opinion contrary to Angsten's positive testimony, and the novelty is increased when the subsequent chairman's opinion is inferred from circumstances and is not proved by the affidavit or testimony of the subsequent chairman.)

The fact that O'Connell was using a personally conceived device, outside the scope of his employment in receiving the deposit of Pinkerton's collateral, is evidenced by the fact that, of the one thousand insurers who deposited securities under the Illinois Workmen's Compensation Act, all except thirty-four, whose property it is claimed O'Connell converted, made their deposits with banks as depositaries as required by Rule 39 (R. 24). The fact that he was using such a personally conceived device will be further borne out by an examination of the photostatic copy of the agreement of August 9, 1935, which is included in the original record. In the printed record (R. 14, 25, 35) it would appear as if the name "Ind. Comm. of Ill." is a printed part of the form. This is not the fact. The form was provided and printed for use in connection with deposits of collateral with *banks* by applicants who had existing liability, and blank spaces are provided in the form for writing in the name of the bank which is to act as depositary. The name "Ind. Comm. of Ill." is typewritten in the agreement of August 9, 1935 in the blank space so provided in the printed form for writing in the name of the bank as depositary. The third paragraph of the printed form reads: "* * * it is further agreed between the parties that the said monies, bonds, warrants or any other approved securities shall be surrendered by said *bank* to the said * * *." (Italics ours.)

The word "bank" is stricken by the use of X's and the name "Ind. Comm. of Ill." is inserted by interlineation between the lines above the deleted word "bank". Thus, the form itself shows that it was not prepared for deposits to be made with the industrial commission and that it was contemplated by the commission that deposits of collateral were to be made with a bank as depositary.

Thus, the Circuit Court of Appeals weighed conflicting evidence and adjudicated the issue of fact as to authority delegated to O'Connell in summary judgment proceedings when no effort was made by either party to produce all evidence on the subject in violation of the surety's right to a jury trial (R. 5). Rule 38(d) of Federal Rules of Civil Procedure.

Rule 56(c) of the Federal Rules of Civil Procedure authorizes a court to determine causes under summary judgment procedure only where there is "no genuine issue as to any material fact." It does not authorize any court in a summary judgment proceeding to try an issue of fact. When the Circuit Court of Appeals found that deductions from circumstances furnished evidence in opposition to Angsten's affirmative affidavit, it merely found that there was an issue of fact between the affidavit and the circumstances. Having so found, it was the duty of the Circuit Court of Appeals to remand the cause with instructions to the trial court to have a trial on the issue, wherein all of the evidence on the subject could be produced and considered by a jury.

By its action, the Circuit Court of Appeals has construed Rule 56 to authorize it to decide controverted issues of fact in summary judgment proceedings. In so doing, the Court's exercise of power conflicts with every decision of Circuit Courts of Appeals construing Rule 56 rendered to the present time. The power of courts to determine contested issues of fact in summary judgment proceedings

has been considered by Circuit Courts of Appeals in seven cases since Rule 56 was adopted. Those courts, other than the Circuit Court of Appeals of the Seventh Circuit, have uniformly held that the power of courts to weigh evidence in such proceedings is limited to determining whether there is a genuine issue of material fact, and that, where such issue exists, the court has no power to determine that issue on summary judgment proceedings.

We first cite *Miller* v. *Miller*, 122 F. (2d) 209, because it is similar to the case at bar, in that the opposing evidence was an affidavit on the one side and inferences drawn from facts on the other. Suit was upon an alimony judgment, entered by a Nevada court, which provided that upon plaintiff's remarriage alimony should continue for the support of two children during their minority. The defendant filed an answer alleging, on information and belief, that plaintiff had remarried and on deposition testified that plaintiff had not replied to a letter accusing her of remarrying and that plaintiff had associated with one Carmalt in a manner that indicated marriage. Plaintiff filed an affidavit that she had not remarried, but did not deny failure to reply to the letter for four years or the close association with Carmalt. The court considered the plaintiff's silence and her close association with Carmalt as circumstantial evidence opposed to her positive affidavit and reversed a summary judgment for plaintiff, saying, page 212:

> "We think that this testimony raised a genuine issue as to the material fact of remarriage."

The court construed Rule 56 (c) as follows:

> "Rule 56 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except

as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' The purpose of this rule 'is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings.' However, '*The court is not authorized to try the issue, but is to determine whether there is an issue to be tried.*' '*To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it,* that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force.' " (Italics ours.)

To the same effect are: *McElwain* v. *Wickwire Spencer Steel Co.*, (C. C. A. Second) 126 Fed. (2) 210, 211; *Merchants Indemnity Corporation* v. *Peterson*, (C. C. A. Third) 113 Fed. (2) 4, 6; *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, (C. C. A. Third) 130 Fed. (2) 1016, 1018; *Whitacre* v. *Coleman*, (C. C. A. Fifth) 115 Fed. (2), 305, 306-7; *Acadian Production Corporation of Louisiana* v. *Land*, (C. C. A. Fifth) 136 Fed. (2) 1, 2-3; *Ramsouer* v. *Midland Valley R. C.*, (C. C. A. Eighth) 135 Fed. (2) 101, 105-6.

II.

The Circuit Court of Appeals Has Deprived the Surety of Its Right to a Trial by Jury of the Issue of Fact as to O'Connell's Authority, in Violation of the Seventh Amendment to the Constitution of the United States.

Pinkerton demanded a jury trial at the time it filed its complaint (R. 5). Under Rule 38 (d) of the Federal Rules of Civil Procedure, this demand inures to the benefit of defendant and may not be withdrawn without the consent of the parties. The amount involved is more than $20.00

and there is a real issue of fact as to O'Connell's authority. We believe it so obvious that the surety has been denied a jury trial in deprivation of its rights under the seventh amendment as to make citation of authorities or arguments mere surplusage.

III.

The Industrial Commission of Illinois Itself Had No Power to Accept or Hold Deposits of Collateral From Applicants Seeking to Become Self-Insurers. Hence, the Receipt of Pinkerton's Deposit Could Not Have Been by Virtue of O'Connell's Office or Employment.

Section 26 (a) of the Illinois Workmen's Compensation Act, (Illinois Revised Statutes 1941, Chap. 48, Par. 163), provides that an employer acting under the Act shall:

> "(1) File with the commission a sworn statement showing his financial ability to pay the compensation provided for in this Act,"
>
> * * *
>
> "If any such employer fails to file such a sworn statement, or if the sworn statement of any such employer does not satisfy the commission, of the financial ability of the employer who has filed it, the commission shall require such employer to,
>
> "(2) Furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act, or
>
> "(3) Insure his entire liability to pay such compensation in some insurance carrier * * *, or"
>
> "(4) Make some other provision, satisfactory to the industrial commission, for the securing of the payment of compensation provided for in this Act, * * *."

The Industrial Commission adopted Rule 39 for self insurers as follows:

> "Requirements for the Procuring of Self Insurance.
>
> "Application for permission to become a self in-

surer shall be accompanied by a current financial statement of the applicant, which statement shall show to the satisfaction of the Industrial Commission ability on the part of the employer to discharge accruing liability under the Workmen's Compensation Act. However, no application to become a self insurer will be entertained by the Industrial Commission unless the applicant for such privilege shall have deposited *in the name of an approved trustee and in an approved depositary a fund* sufficient to discharge all liability that may have accrued by reason of awards for the payment of compensation that have become final on the date of such application." (Italics ours.)

No provision is made by the rules for the depositing of collateral other than that contained in Rule 39. It will be noted that the rule limits such deposits to be made "* * * in an approved depositary * * *". If this rule is a complete and exclusive statement of the manner in which collateral is to be deposited by self-insurers, or if it is only a partial statement and applicable to the type of deposit made by Pinkerton, it is apparent that it was beyond the power of the Industrial Commission to receive such deposit and that, as a matter of law, O'Connell did not act by virtue of his office and the surety is not liable for O'Connell's conversion of Pinkerton's treasury bond.

It is axiomatic that a rule adopted by a court or by a quasi-judicial body has the effect of a statute and is binding on and must be followed by the body adopting it, as well as the public, without deviation, in the absence of a reservation of power to make exceptions. (*Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, 608; *People* v. *Robertson*, 302 Ill. 422, 428.)

The Circuit Court of Appeals avoids the effect of Rule 39 in two ways. It says (1) that the second sentence of Rule 39 limits its application to deposits by self-insurers to secure accrued liability and that the rule is not

applicable to deposits to secure future accruing liability; and (2) that if Rule 39 requires deposits of collateral by all applicants to become self-insurers, it nullifies the provisions of Par. 1 of Section 26(a) of the Illinois Workmen's Compensation Act, which authorizes employers to become self-insurers upon the furnishing of a satisfactory financial statement alone, and that the Industrial Commission could not by rule minimize the rights granted by the statute to employers to become self-insurers.

The reasoning of the Circuit Court of Appeals is fallacious in both respects. The first position taken by the court is based on the fallacious assumption that Pinkerton's deposit was made to secure future liability. Pinkerton did not attempt to prove by affidavit or otherwise, that its treasury bond was deposited as security for *future accruing* liability. The assumption by the Circuit Court of Appeals that the deposit was made for such purpose is not only not based upon any evidence, but is in conflict with the deposit agreement of August 9, 1935, which provides that the treasury bond shall be returned to Pinkerton upon presentation of a certificate "* * * that no payments *are due and unpaid* from the said Pinkerton's Natl. Det. Agency, Inc., to its employees or others under the Compensation Law" (R. 15). It will be noted that the condition upon which the collateral is to be returned does not include the requirement that Pinkerton shall have ceased to act as a self-insurer. The only event necessary to entitle Pinkerton to a return of its collateral is the absence of outstanding liability.

The deposit agreement is the only evidence in the record, direct or circumstantial, which shows the liabilities secured by the deposit and the Circuit Court of Appeals' assumption that the deposit was made to secure future liability is contrary to the agreement and without foundation in evidence.

The fallacy of the reasoning of the Circuit Court of Appeals, that a construction of Rule 39 which would require applicants who seek to become self-insurers to make deposits of collateral with a bank, in the absence of accrued liability, would amount to administrative limitation of the statutory privilege to become self-insurers upon a showing of financial ability alone, is demonstrated by a mere consideration of the statement. If the requiring of collateral from employers having no accrued liability is void as an administrative limitation of the statutory right to act as self-insurer on financial statement alone, that simply means that the Industrial Commission had no power to require the deposit in question from Pinkerton if such deposit was required to secure future liability, as the Court assumes. Thus, if the Court's reasoning is correct, the Industrial Commission had no right to require the deposit in question by Pinkerton and the receipt of such deposit was beyond the scope of the Commission's power. If the deposit was made to secure accrued liability, then the Circuit Court of Appeals concedes Rule 39 is applicable, and it follows that the receipt of the deposit by the Commission was beyond its power, because Rule 39 requires such deposits to be made in an approved depositary in the name of an approved trustee. A further fallacy in the position taken by the Circuit Court of Appeals is that it is based upon the assumption that a rule of the Commission requiring deposits of collateral from self-insurers who have no accrued liability would impair the privilege granted by the Legislature, whereas such a requirement of applicants against whom liability has accrued would not. There is no basis in the statute for distinguishing between applicants who have accrued liability and those who do not. The third fallacy is, having erred in considering the Compensation Act to

justify such distinction, the Court assumed, without basis in evidence, that the deposit in question was made to secure future liability, whereas the only evidence in the record shows that it was made to secure accrued liability.

Pinkerton has argued and may argue here that sub-paragraphs 2 and 4 of Section 26(a), respectively, requiring an employer whose financial statement is not satisfactory to furnish security or authorizing the Industrial Commission to "make some other provision, satisfactory to the industrial commission, * * *" for the securing of compensation payments, vests power in the commission to act as depositary. No measure or standard is provided by the Act for determining the amount, manner, to whom, or terms upon which the security is to be given under sub-paragraph 2. The authority purported to be conferred by sub-paragraph 4 is even more general than the requirement of sub-paragraph 2.

It is the established law of Illinois that a statutory delegation of power to an administrative body which provides no standard or measure of the procedure to be adopted is unconstitutional as an unauthorized delegation of legislative power. In *The People* v. *Federal Surety Co.*, 336 Ill. 472, suit was upon the bond given by a dealer in securities to qualify under the Illinois Securities Law. The defense was that the bond was void and unenforceable because of the unconstitutionality of the statute pursuant to which it was required. That statute provided for the giving of a bond "* * * with terms, conditions and in forms to be approved by the Secretary of State * * *." But no other provision was made as to the terms or conditions of the bond and no provision was made as to the amount to be required, except that a maximum limit was specified. The court held the statute unconstitutional as

an illegal delegation of legislative power, saying at page 480:

> "The requirement of a bond from dealers and brokers in securities is an appropriate means to adopt for the protection of those dealing with them, but the legislature must itself determine what the terms and conditions of the bond must be, and, if classification is intended, must fix the reasonable terms of classification which govern the amount and condition of the bonds. The section is defective in that it does not comply with the constitutional requirements."

As the Circuit Court of Appeals states, there is no Illinois decision squarely in point on the power of the industrial commission to act as depositary of collateral. That question is, however, before the court in *People* v. *O'Connell*, case number 27673, now pending in the Supreme Court of Illinois. O'Connell was convicted on an indictment under Section 80 of the Illinois Criminal Code (Illinois Revised Statutes, 1943, Chap. 38, Par. 214), which pertains only to embezzlement of property in the possession of a public employee by virtue of his office. One of the positions taken by the defendant is that the industrial commission has no power to act as depositary and, consequently, he could not have received the security (under circumstances similar to that in the instant case) by virtue of his office. It is probable that the Supreme Court of Illinois will render its decision in that case during the month of March, 1944.

IV.

In Holding That Pinkerton's Action Is Not Barred by the Illinois Five Year Statute of Limitations, the Decision of the Circuit Court of Appeals Is in Conflict With Every Applicable Decision of the Reviewing Courts of Illinois.

Pinkerton filed its complaint on July 21, 1942 to recover damages for a conversion of its treasury bond alleged to have occurred "during the year 1936" (R. 2). The surety pleaded the Illinois five year Statute of Limitations (R. 9). The Circuit Court of Appeals stated in its opinion that it had some doubt as to the period of limitation applicable to suits on official bonds in Illinois, but held that rule was not involved because:

> "We are inclined to view that the suit is upon a written instrument, namely, the Escrow Agreement entered into *between plaintiff and the Commission*" (Italics ours).
>
> • • • • •
>
> "In our judgment plaintiff's cause of action did not accrue until January 9, 1942 when plaintiff made demand for the return of its property and there was a failure to return it, as required by the contract between plaintiff and the Commission." (Appendix 37.)

We believe it does not require the citation of authority to show that the instant suit is not upon the escrow agreement. The escrow agreement is not pleaded in Pinkerton's complaint, either in substance or in *haec verba*. The surety is not a party to that agreement and Pinkerton does not purport to sue the surety thereon. The suit is upon the official bond executed by the petitioner, as surety for O'Connell, a copy of which bond is attached as Exhibit "A" to the complaint (R. 2, 5). That bond is the only document executed by the surety and the execution

of such bond is the only respect in which the surety participated in any of the acts involved in this suit and any liability on its part must be bottomed solely upon that bond.

The Circuit Court of Appeals does not deny the applicability of the Illinois five year Statute of Limitations (Illinois Revised Statutes, 1941, Chap. 83, Section 16)[1] to suits on bonds of public employes. It says a reading of the Illinois cases leaves the court in some doubt. Instead of resolving its doubt, the court by-passes the question by its erroneous conclusion that the suit is upon the escrow agreement and that Pinkerton's action did not accrue until January 9, 1942, when it demanded return of its property.

The applicability of the five year Statute of Limitations to cases in which a surety is sued upon an official bond is so well established in Illinois that the Circuit Court of Appeals should have had no doubt as to its applicability to this case. The Illinois rule is that the bond does not create the duty or the plaintiff's right, but that the gist of the plaintiff's action is the wrongful act or breach of duty by the official for whom the bond stands merely as security and that the action is barred by the lapse of the period within which an action for the wrongful act is barred.

The rule in Illinois is firmly established by *People for the use of Hammond* v. *Graydon, et al.*, 306 Ill. App. 163, 166-169 (Leave to appeal denied by the Illinois Supreme

1. The section reads: "Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

Court, 306 Ill. App. XXXIII); *People for the use of Stubblefield,* v. *Wochner,* 244 Ill. App. 30, and by *People for the Use of Town of New Trier, etc.* v. *Sanborn Hale,* No. 42657, decided by the First District of the Appellate Court of Illinois on December 13, 1943. In *People for the use of Hammond* v. *Graydon, et al.,* 306 Ill. App. 163, suit was against the sheriff and the surety upon his official bond to recover damages for a wrongful levy which occurred more than five years and less than ten years prior to the filing of the action. The defense was the Illinois Five Year Statute of Limitations. In sustaining this defense, the court reviewed the authorities and held the five year Statute applicable.

The rule is based upon a sound public policy which declines to extend the period of exposure of public officials or their sureties to litigation beyond the ordinary period merely because a bond has been given as collateral security for the officers' wrongful acts. Such rule is not unique or an Illinois anomalism, but is followed in other jurisdictions and is recognized as the weight of authority. (*County of Sonoma* v. *Hall,* 132 Cal. 589; *Commissioners of Graham Co.* v. *Van Slyck,* 52 Kan. 622; *Spokane Co.* v. *Prescott,* 19 Wash. 418; *People* v. *Putnam,* 52 Colo. 517; Ann. Cas. 1913 E. pp. 1264-1266; 22 R. C. L. § 196.)

But even if the Illinois rule were an anomalism the federal courts are bound to follow the Illinois rule (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64), and there should be no hesitation in applying it to the case at bar.

Pinkerton has contended and the Circuit Court of Appeals held that if the five year Statute of Limitations is applicable, the action is not barred because it did not accrue until January 9, 1942, when Pinkerton demanded return of its treasury bond, which was within five years of the filing of suit. This contention is predicated upon the

assumption that Pinkerton's treasury bond was converted by the lawful holder thereof. In *O'Connell* v. *Chicago Park District*, 376 Ill. 550, the court specifically holds that where possession is obtained wrongfully the cause of action accrues at the time possession is obtained and that such cause is the only cause of action arising out of the transaction and that a new cause does not accrue at the time of demand. Applied to the case at bar, if the possession of Pinkerton's bond by the industrial commission was rightfully obtained, a second cause of action accrued in favor of Pinkerton against the industrial commission at the time of Pinkerton's demand for the return of the bond on January 9, 1942. The instant suit is not against the industrial commission or its surety. Pinkerton contends, and the Circuit Court of Appeals' decision is predicated upon the proposition that the treasury bond was deposited with the industrial commission acting through its agent O'Connell and that it was not deposited with O'Connell individually and outside of the scope of his duties. If such is the case, contract relationship, whether express or implied, exists solely between Pinkerton and the industrial commission and no contract relationship exists between Pinkerton and O'Connell. The moment O'Connell took the bond individually, he committed a wrongful act, even under Pinkerton's theory of the case, and this wrongful act constituted a conversion of Pinkerton's bond for which a cause of action accrued against O'Connell and the surety. Since the taking of possession by O'Connell in his individual capacity was a wrongful act, *O'Connell* v. *Chicago Park District*, 376 Ill. 550, above cited, is specific authority that the only cause of action which ever arose is the cause of action for conversion, which arose at the time of the conversion alleged by Pinkerton to have been in 1936, more than five years prior to the institution of suit. The case is also authority for the proposition that no new cause of

action arose at the time O'Connell sold the treasury bond, but this is immaterial in view of the fact that the conversion and disposition of the bond by O'Connell both occurred in 1936, more than five years prior to institution of suit. Thus, it is apparent that the only cause which ever arose against the surety arose at the time of the conversion. It is futile to say that Pinkerton could not have sued the industrial commission until Pinkerton was entitled to the return of its bond from the industrial commission. Regardless of whether Pinkerton could have sued the industrial commission, it could have sued any third party, including O'Connell, which converted the bond from the industrial commission during the time the commission was entitled to hold the bond as depositary under the deposit agreement of August 9, 1935. Surely, if A bails a chattel to B for a specific period of time and C converts the chattel, A has a cause of action against C, notwithstanding the fact that the time during which B is entitled to hold the chattel had not expired. Hence, we submit that Pinkerton and the Circuit Court of Appeals confuse the date when plaintiff's right of action against defendant arose with the date when plaintiff's possible cause of action against the industrial commission arose in their conclusions that the instant suit was filed within five years after the cause of action accrued.

Pinkerton has contended and may contend here that the Statute of Limitations was tolled by reason of fraudulent concealment of the cause of action by O'Connell under the provisions of Section 22 of the Illinois Statute of Limitations (Illinois Revised Statutes, 1941, Chap. 83, Par. 23).[1]

1. The section reads:

"If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

The mere reading of the statute demonstrates that acts of concealment on the part of O'Connell do not toll the statute as against the surety. It is not charged that the surety, which is the only defendant to Count II of Pinkerton's complaint, in any manner concealed the cause of action. The relationship of principal and agent does not exist between O'Connell and the surety, but even if such close relationship did exist, the concealment by O'Connell would not toll the statute as against the surety. (*Wood* v. *Williams*, 142 Ill. 269, 280.)

Conclusion.

There is a genuine issue of fact as to whether O'Connell acted by virtue of his office in receiving Pinkerton's deposit. This issue is material and a judgment cannot be entered in favor of Pinkerton without deciding that issue. Under Rule 56 of the Federal Rules of Civil Procedure no court is empowered to decide that issue on summary judgment proceeding. Not only is such power lacking under the rule, but the Seventh Amendment to the Constitution guarantees the surety a jury trial. The exercise of power by the Circuit Court of Appeals conflicts with the decisions of the other circuits, violates Rule 56 and deprives the surety of its constitutional rights. In addition, the Circuit Court of Appeals has decided the question as to the applicability of the five year Statute of Limitations in conflict with the applicable local decision, and for the above reasons this court is justified in exercising its supervisory power and granting the writ of certiorari.

Respectfully submitted,

LOUIS L. DENT,
Attorney for Petitioner.

DENT, WEICHELT & HAMPTON,
Of Counsel.